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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 495

JOSEPH T. RYERSON AND EDWARD L. RYERSON,
JR., AS EXECUTORS OF THE ESTATE OF MARY M. RYERSON,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable Charles Evans Hughes, Chief Justice of
the United States, and the Associate Justices of the
Supreme Court of the United States:*

Your petitioners respectfully pray that a writ of certiorari issue to review the judgment entered against the petitioners by the United States Circuit Court of Appeals for the Seventh Circuit in the above-entitled cause on July 9, 1940.

Opinions Below.

The opinion of the Circuit Court of Appeals was filed July 9, 1940, *Ryerson v. United States*, F. (2d) The opinions of the District Court, filed March 31, 1939 and, on rehearing, June 29, 1939, are reported in *Ryerson v. United States*, 28 F. Supp. 265.

Jurisdictional Statement.

This petition is presented in accordance with Section 240 (a) of the Judicial Code (43 Stat. 938, U. S. C. Tit. 28, sec. 347). The judgment of the Circuit Court of Appeals sought to be reviewed was entered on July 9, 1940.

The Question Presented.

The sole question presented in this case is whether, under Section 504(b) of the Gift Tax Act of 1932, the donor of gifts in trust is entitled to one exclusion of \$5,000 for each trust to which property is transferred, or to one exclusion for each beneficiary of the trusts.

The Statute Involved.

Section 504 of the Gift Tax Act of 1932 (47 Stat. 247, U. S. C. Tit. 26, sec. 1003), in force in 1934, provided as follows:

“(a) GENERAL DEFINITION.—The term ‘net gifts’ means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

“(b) GIFTS LESS THAN \$5,000.—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first \$5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.”

Statement.

This case involves the construction of the Gift Tax Act of 1932, and concerns gifts made during the year 1934 by Mary M. Ryerson, of whose estate the petitioners are executors. During the year 1934, the taxpayer, Mary M. Ryerson, made, among other gifts, transfers to two trusts,

one for the benefit of two, and the other for the benefit of three persons. Section 504(b) of the Gift Tax Act of 1932 (47 Stat. 247, U. S. C. Tit. 26, sec. 1003), which was in force in 1934, excluded from taxation the first \$5,000 of gifts "made to any person by the donor during the calendar year." The Commissioner of Internal Revenue took the position that when gifts are made by a transfer of property to trustees for the benefit of two or more persons, the number of \$5,000 "exclusions" to be permitted under this statutory provision is determined by the number of trusts created, rather than by the number of beneficiaries. He assessed, and the taxpayer paid, a gift tax on that basis.

The taxpayer duly filed claims for refund upon the ground that the number of exclusions should be determined by the number of persons receiving beneficial interests. The claims were rejected, and the taxpayer thereafter brought suit against the United States in the District Court under the Tucker Act (24 Stat. 505, U. S. C. Tit. 28, sec. 41(20)). The District Court determined this question in favor of the plaintiff and permitted an exclusion of \$5,000 for each beneficiary of the above mentioned trusts, deciding another question (a valuation question not involved in this petition) in favor of the United States. Both parties appealed to the Circuit Court of Appeals, where the appeals were consolidated. Pending the appeals, the taxpayer died, and the petitioners, as executors of her estate, were substituted as parties in her stead. The Circuit Court of Appeals reversed the District Court upon both issues, and upon the one here in question it held, by a divided court, that only one \$5,000 exclusion should be allowed for each of the two trusts created.

The tax due on account of the gifts made by the taxpayer during the year 1935 is also involved. There is no con-

troversy regarding the amount of the gifts made in that year, but since the rate at which gifts are taxed for any year depends upon the total amount of gifts made in previous years, the controversy concerning the gifts made during 1934 affects the tax due for the year 1935.

Specification of Error to Be Urged.

The Circuit Court of Appeals for the Seventh Circuit erred in holding that under Section 504(b) of the Revenue Act of 1932 the plaintiff was entitled only to one \$5,000 exclusion for each trust in question rather than to one exclusion for each beneficiary.

Reasons for Allowance of the Writ.

A.

The decision of the Circuit Court of Appeals in this case is directly in conflict with the decisions of five other Circuit Courts of Appeals and of the Court of Claims on the same question. The government has filed petitions for writs of certiorari in two of these cases.

Welch v. Davidson, (C. C. A. 1st, 1939) 102 F. (2d) 100.

McBrier v. Commissioner, (C. C. A. 3d, 1939) 108 F. (2d) 967.

Early v. Reid, (C. C. A. 4th, August 7, 1940) _____ F. (2d) _____, 1940. C. C. H. Fed. Tax Serv. par. 9634.

Hutchings v. Commissioner, (C. C. A. 5th, 1940) 111 F. (2d) 229, petition for a writ of certiorari filed September 11, 1940, *Helvering v. Hutchings*, No. 419.

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Pelzer v. United States, (Ct. Cl. 1940) 31 F. Supp. 770, petition for a writ of certiorari filed September 3, 1940, *United States v. Pelzer*, No. 393.

The court below, in reversing the judgment of the District Court, did not refer to any of these cases, all but one of which had been handed down prior to the decision herein. In the latest opinion on the subject by a Circuit Court of Appeals, it was said:

"On July 9, 1940, after the argument in the pending case, the Circuit Court of Appeals for the Seventh Circuit by a divided court in *United States v. Ryerson*, F. (2d), reached the opposite conclusion in a similar case. Without reference to the strong current of contrary authority, the court based its conclusion upon its earlier decision in *Commissioner v. Wells*, to which we have referred. We find ourselves in accord with the reasoning of the other circuits, and the judgment of the District Court is therefore affirmed."

Early v. Reid, (C. C. A. 4th, August 7, 1940) F. (2d), 1940 C. C. H. Fed. Tax Serv. par. 9634.

B.

The question involved is an important one, concerning the construction of a federal statute, which has not been, and should be, settled by this court. Although the statute has been amended so that the \$5,000 exclusion is eliminated in the case of all gifts in trust made after December 31, 1938,¹ many cases are pending concerning gifts made prior to that date. The government's petition for a writ of certiorari in *United States v. Pelzer*, filed September 3, 1940, No. 393 (p. 9) states that there are approximately 35 cases involving this problem now pending in the federal courts, and a considerably larger number before the Board of Tax Appeals and in the Bureau of Internal Revenue. Moreover, the question will continue to arise in connection with

(1) Revenue Act of 1938, section 505, 52 Stat. 565.

gifts made subsequent to 1938, because the rate of tax in each year is still dependent on the total amount of gifts made in prior years.

The decision in this case, if allowed to stand, will constitute an unfortunate precedent. This court, in keeping with its disposition of tax questions upon the basis of economic benefit rather than of refinements in title, has recently held that when a transfer is made in trust, with the right reserved to change the beneficiaries, no gift tax is payable, and, conversely, that a tax is incurred when the right to change the beneficiaries is surrendered.

Estate of Sanford v. Commissioner, (1939) 308 U. S. 39.

Rasquin v. Humphreys, (1939) 308 U. S. 54.

In the *Sanford* case the court said (pp. 42-3):

"When the gift tax was enacted Congress was aware that the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title. . . . 'Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed.'"

By the decision of the Circuit Court of Appeals in the case at bar, a taxpayer who transfers property to one trust for several beneficiaries is permitted only one exemption from tax, while a taxpayer who creates a number of trusts, all for the same beneficiary, receives several exemptions, and may even avoid the tax entirely. The dissenting opinion in the Circuit Court of Appeals said of the petitioners' contention:

"It seems to me that any other construction does violence to the congressional intent and promotes evasion of taxes. If the trust and not the beneficiary is the donee, then a donor may, by creating ten separate trusts, that is, creating ten trusts in ten separate persons as trustees and by designating the same beneficiary in each trust, give \$50,000 to one donee without payment of any gift tax. This result, I think, is not

within the express purport or implication of the legislation. Rather the Congress meant to prevent tax-free donations in excess of \$5,000 in any recipient."

By the decision in the court below, the right to an exemption and the duty to pay the tax are both made to depend not upon the transfer of economic benefit, but upon the technical question of whether one trust is created for the benefit of several persons, or several trusts for the benefit of one person.

Conclusion.

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

*Joseph T. Ryerson and Edward L.
Ryerson, Jr., as Executors of the
Estate of Mary M. Ryerson,*

By **WALTER T. FISHER,**
WILLIAM N. HADDAD,
Counsel for Petitioners.

October, 1940.